Supreme Court, U.S.
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No. _____ 08-83 JUL 15 2008

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In The

Supreme Court of the United States

ROSLYN HOLMAN,

Petitioner (Pro se),

v.

CLEMSON UNIVERSITY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

ROSLYN HOLMAN
(*Pro se Petitioner*)
1333 Stillfork Road
Darlington, SC 29532
(843) 393-2036

QUESTIONS PRESENTED

1. Whether Court of Appeals and District Court willfully violated Rule 56(c) of the Federal Rules of Civil Procedure.

2. Whether Court of Appeals and District Court employed a grave abuse of discretion and willfully failed to apply legal standards and entered Opinion and Orders unsupported by evidence on record.

3. Whether Court of Appeals and District Court willfully violated Petitioner's (a) Seventh and Fourteenth Amendment rights *and* (b) Protection Under Title VII.

PARTIES TO THE PROCEEDING

The parties to this proceeding are Petitioner, Roslyn Holman and Respondent, Clemson University.

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PETITION FOR WRIT OF CERTIORARI

Roslyn Holman, Petitioner respectfully petitions for Writ of Certiorari to review the Opinion and Order of the United States Court of Appeals for the Fourth Circuit in this case.

STANDARD OF REVIEW

Petitioner respectfully requests this Honorable Court to adopt and employ the standard of review set forth in *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594 (1972), wherein the United States Supreme Court held that Pro Se Petitions are to be held to a less stringent standard than formal proceedings drafted by attorneys and construed liberally.

OPINIONS BELOW

The Unpublished Per Curium Opinion of the United States Court of Appeals for the Fourth Circuit panel judges: Motz, Gregory and Ducan (App. 1-2), Judgment (App. 3), Petition for Rehearing Denial (App. 28); the Order of the District Court (App. 4-6), Judgment (App. 7); Magistrate Judge's Report and Recommendations (App. 8).

JURISDICTION

The judgment of the Court of Appeals was entered on February 12, 2008. The petition for rehearing was denied on April 18, 2008. This Petition is timely filed according to Supreme Court Rules 13.1 and 13.3. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

Seventh Amendment
Right to Trial by Jury

Fourteenth Amendment
Right to Due Process and Equal Protection of the Laws

STATUTES AND REGULATIONS

18 U.S.C. § 242
Deprivation Of Rights Under Color of Law

28 U.S.C. § 636(b)(1)
Required de novo review

42 U.S.C. § 2000e, et seq.
Title VII of the Civil Rights Act of 1964, as amended

Title VII § 704(a)
Anti-retaliation Provision

Rule 56 of the Federal Rules of Civil Procedures

Rule 56(c)

Rule 56(e)

STATEMENT OF THE CASE

This Civil Action commenced following Equal Employment Opportunity Commissioner's (EEOC) dismissal of Petitioner's Complaint and issuance of Right to Sue. On September 20, 2005, Petitioner, Roslyn Holman, filed this Civil Action under Title VII Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq., against the Respondent, Clemson University, alleging that on April 8, 2005, she had been wrongfully terminated in retaliation for a previous discrimination complaint filed with EEOC.

The issues in this Petition arise from the Court of Appeals and the District Court's departure from well-established precedents governing civil suits. The lower courts' opinions and orders are devoid of applicable standards, factual findings, conclusions of law and compliance with Rule 56(c).

Court of Appeals Proceedings

On October 4, 2007, Petitioner filed an Informal Appeals Brief with the Court of Appeals appealing the District Court's Order and Judgment entered on August 23, 2007.

Petitioner's Informal Brief presented four (4) issues detailing alleged errs in District Court's Order. Each issue was supported by facts and arguments (an explicit 19 page Memorandum, citing affirmative evidence on record, was attached).

On October 16, 2007, Respondent filed an Informal Brief Response to the four issues in Petitioner's Informal Brief. In pertinent part, the response stated:

> *The District court did not err and for the purposes of the informal brief, the Appellee relies upon the facts and law stated in the District Court's Order and the Magistrate Judge's Report and Recommendations.*

However, the Magistrate Judge's Report and Recommendations and the District Court's Order are affirmatively devoid of facts and law.

On February 12, 2008, the Court of Appeals filed an Unpublished Per Curiam Opinion affirming the District Court's Judgment. The Opinion is devoid of factual determinations and legal standards applicable to Rule 56(c) of the Federal Rules of Civil Procedures. Additionally, Petitioner's Informal Appeal Brief issues and arguments, as well as, the elements of Petitioner's Title VII Claim were unaddressed.

The Court of Appeals' opinion, devoid of factual determinations, legal conclusions, summary judgment and *de novo* standards of review, in pertinent part merely states:

> *We have reviewed the record and find no reversible error.*

On February 25, 2008, Petitioner filed a Petition for Rehearing addressing and questioning overlooked material facts pursuant to evidence on record and misapplication of Fed.R.Civ.P. 56(c).

Petitioner cited affirmative evidence on the record that controverted the Court of Appeals' "affirmed" Opinion and she implored the Court not to infringe upon her Constitutional Rights (Document 16, p. 5, ¶2); yet, the Court of Appeals denied the Petition and its Order (App. 28) merely states:

The Court denies the petition for rehearing.

District Court Proceedings

On November 14, 2006, pursuant to Rule 56 of the Federal Rules of Civil Procedure, Respondent filed a motion for summary judgment. Respondent's motion, exclusively and insufficiently supported by two (2) self-serving affidavits, was devoid of Rule 56(c) requirements and failed to point to the absence of evidence in the record to support Petitioner's Claim.

On December 8, 2006, Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Petitioner filed a combined Opposition and cross-motion for summary judgment. Petitioner's motion was properly supported by requirements of Rule 56(c); on December 21, 2006, Petitioner filed a Supplement to her Opposition and cross-motion. Petitioner's citations to evidence on record controverted Respondent's statement of facts (*inappropriately written as a narrative*); and, Petitioner's citations to evidence on record affirmed the facts as stated in her cross-motion for summary judgment and its supplement.

On December 18, 2006, Respondent filed an Opposition to Petitioner's motion for summary judgment that failed to controvert any of the factual statements in Petitioner's motion for summary judgment.

On January 29, 2007, Petitioner filed a motion for entitlement to summary judgment on the grounds that Respondent's failure to controvert the material facts in her motion for summary judgment and its supplement was an acknowledgement the facts were true. Respondent failed to file an Opposition to this motion, and it was unaddressed by the District Court and the Court of Appeals.

On August 1, 2007, the Magistrate Judge filed his Report and Recommendations. The Report and Recommendations were wholly unsupported by evidence on record. Factual evidence was either suppressed or misrepresented. Although, Petitioner's cross-motion for summary judgment and her motion for summary judgment entitlement were acknowledged in the Report's Introduction, her motions were unaddressed in the body of the Report; yet, recommended for denial in the Report's Conclusion.

The Magistrate Judge's Report cited, but failed to apply, a summary judgment standard of review.

Contrary, to the evidence on record and the conditions governing Fed.R.Civ.P. 56(c), the Magistrate Judge recommended the grant of summary judgment for Respondent, denial of summary judgment for Petitioner and dismissal of Petitioner's Civil Suit.

On August 10, 2007, Petitioner filed specific detailed Objections to Magistrate Judge's Report and Recommendations alleging the Report and the Recommendations were unfounded and bias; the objections pointed to evidence on record that affirmatively controverted the Report and its Recommendations.

Petitioner's Objections readdressed the disputed issues in Respondent's motion for summary judgment that were unaddressed in the Magistrate Judge's Report and Recommendations. The primary three suppressed and unaddressed disputable issues are Respondent's alleged: *(a) lack of funding; (b) implementation of a reduction-in-force; and, (c) justification for termination notice.* The record is devoid of evidence that supports these allegations.

The District Court's Order, dated August 23, 2007, acknowledged Petitioner's cross-motion for summary judgment (Document 58); but failed to provide reason for denying the motion; the Order acknowledged Respondent filed an Opposition to Petitioner's motion (Document 61); but suppressed the fact that Respondent's Opposition asserted there are genuine issues of material facts and the Opposition failed to controvert facts stated in Petitioner's cross-motion(s). Although, Petitioner's entitlement to summary judgment motion (Document 74) was mentioned in the Report's Introduction, unaddressed in the body of the Report, and recommended for denial in the Report's Conclusion, it was not mentioned in the District Court's Order.

The District Court's Order acknowledged Petitioner filed Objections to Magistrate Judge's Report and Recommendation and cited a *de novo* standard of review; however, he failed to conduct the *de novo* review and also failed to apply a summary judgment standard of review.

Petitioner is in a *"protected class"* and her rights are protected under Title VII and its anti-retaliation provisions; yet, the District Court failed to follow the well-established precedents pursuant to Petitioner's Civil Action. The District Court failed to address the wrongful termination element of Petitioner's claim and failed to apply facts, laws, rules or standards of review.

The Magistrate Judge's Report and Recommendation; the District Court's Order; the Court of Appeals Unpublished Opinion and Denial of Petition for Rehearing undermines Rule 56 of the Federal Rules of Civil Procedures and Title VII provisions enacted by Congress that prohibits discrimination.

Based on the Court of Appeals and the District Court's departure from well-established rules and laws governing Civil Suits, Petitioner filed this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I. Violation of Rule 56(c) of the Federal Rules of Civil Procedure

A. Summary judgment was granted on bad faith motion, exclusively and insufficiently supported by two (2) self-serving affidavits of interested parties

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment may be granted only when there is no genuine issue as to material fact and the movant is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Respondent's motion for summary judgment was exclusively and insufficiently supported by two self-serving affidavits (*see* Respondent's motion, Document 55, Ex. 1, Ex. 2) of individuals whom Petitioner alleged in her Complaint (Complaint, Document 1, pp. 4-5, *at* 2, 5, 6) and her cross-motions for summary judgment (*see* Petitioner's motions, Document 58, Facts 9, 11, 12; Document 64, p. 3) illegally terminated her position and later manufactured conflicting documents (*see* Respondent's motion, Document 55, Ex. 2B-2F); the fact that the two affidavits were in bad faith was also noted in Petitioner's Objections to Report and Recommendations (Document 91, p. 5, ¶2). Respondent's motion for summary judgment cannot be granted if its underlying affidavits are controverted by contrary evidence in the record and by acts of bad faith; *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981).

Respondent failed to show the absence of evidence in the record to support Petitioner's Claim; *See Celotex Corp. v. Catrett, supra,* 477 U.S. at 322-23; *Adickes v. S. H. Kress & Co.,* 398 U.S. 144, 157 (1970). Respondent's "lack of funding" *and* "reduction-in-force" scenario, merely consist of a bogus unsigned proposed reduction-in-force plan on plain paper that does not correspond to position previously held by Petitioner (Respondent's motion for summary judgment, Document 55, Ex. 2B v. Ex. 2F). It is clear that Respondent failed to meet its burden under Rule 56(c); *United States v. Dibble,* 429 F.2d 598 (9th Cir. 1970).

Petitioner's Claim is supported by uncontroverted evidence (Document 58, p. 5, Fact 4; pp. 7-8, Fact 10; Ex. D2-D3; Document 64, pp. 2-5) showing an increase in funding that controverted Respondent's alleged "lack of funding" reason for reduction-in-force (Document 55, Ex. 2D).

Pursuant to Respondent's motion for summary judgment, unsubstantiated issues of material facts remaining in dispute are: (a) "lack of funding"; (b) "implementation of a reduction-in-force"; and (c) "termination notice justification." *A factual dispute is "material" only if it "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986); *see* Petitioner's motion for summary judgment supporting argument (Document 58, pp. 11-12).

Respondent's motion for summary judgment support documents primarily discuss its policy for

implementing a reduction-in-force (Document 55, pp. 3-5, Ex. 2). The Magistrate Judge's Report merely mentions Respondent's alleged proposed reduction-in-force plan (App. 23) and failed to cite evidence on record that affirms implementation of a legitimate reduction-in-force.

> Pursuant to *Rule 56 of the federal rules, a party against whom a motion for summary judgment is directed need not file any contravening affidavits or other material but is entitled to a denial of the motion for summary judgment where the movant's papers are insufficient on their face or themselves demonstrate the existence of a material issue of fact. See Island Equipment Land Co. v. Guam Eco. Dev. Auth.*, 474 F.2d 753 (9th Cir. 1973); Advisory Note of 1963 to Subdivision (e), Rule 56.

Additionally, subsequent to moving for summary judgment, Respondent's Opposition (Document 61, ¶2) to Petitioner's cross-motion for summary judgment (Document 58), in pertinent part states:

> . . . . *There are at the very least issues of material fact that preclude summary judgment in favor of the Plaintiff.*

Under Fed.R.Civ.P. 56(c), Respondent's admission to the existence of issues of material facts was self-exclusion; however, the District Court granted summary judgment. The record as a whole is affirmatively devoid of evidence to support summary judgment "*as a matter of law*" in favor of the Respondent.

B. Summary judgment was granted and denied under Fed.R.Civ.P. 56(c) without applying specific determinations required by the rule

Civil Procedure Rule 56(c) provides in part that summary judgment:

> shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The Court of Appeals (App. 1-3) and the District Court (App. 4-7) inappropriately granted and denied summary judgment under Rule 56(c) without making the required specific determinations.

Although, a summary judgment standard of review was cited in the Magistrate Judge's Report (App. 15-17), it was unapplied. Contrary, to the evidence on record and statute governing Rule 56(c), the Magistrate Judge recommended the grant of summary judgment for Respondent, denial of summary judgment for Petitioner and dismissal of Petitioner's Civil Action (App. 25-26). More importantly, non-compliant with Rule 56(c), the Magistrate Judge's recommendation is based wholly on his inappropriate and deceptive weighing of Petitioner's exhibits (App. 18-21) as opposed to determining the facts in the whole record in conjunction with Rule 56(c) stipulations to determine whether the record was devoid of

any genuine material issues to be tried by jury. Fed.R.Civ.P. 56 calls for the judge to determine whether there exists a genuine issue for trial, not to weigh the evidence himself and determine the truth of the matter. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2516, 91 L.Ed.2d 202 (1986).

Court of Appeals (App. 1-2) and District Court (App. 4-6) failed to determine under Fed.R.Civ.P. 56(c) whether: (a) Respondent's motion was sufficiently supported; (b) Respondent had met its burden of production; (c) the record shows no genuine issue as to any material fact; and, (d) Respondent was entitled to summary judgment as a matter of law.

Pursuant to denial of summary judgment on Petitioner's motions (Documents 58, 74):

> Court of Appeals and District Court failed to determine under Fed. R. Civ. P. 56(c) whether Petitioner's motion was insufficiently supported *and* (b) whether Petitioner failed to meet her burden of production.

The Court of Appeals' Opinion and the District Court's Order ignored Petitioner's citations to evidence on record that affirmatively controverted Respondent's motion for summary judgment memorandum, affidavits and exhibits. Petitioner affirmatively confirmed Respondent's articulated proffered non-retaliatory reason for Petitioner's termination to be false (Document 64, pp. 4-5). *See Alvarado v. Bd. of Trs. of Montgomery Comm. Coll.*, 928 F.2d 118, 122-23 (4th Cir. 1991).

C. Petitioner's properly supported cross-motion(s) for summary judgment were unaddressed and inappropriately denied

Petitioner's cross-motion(s) for summary judgment (Documents 58, 64, 74) were properly supported by self-affidavit and citations to pleadings, answer to interrogatories, admissions, conflicting inconsistencies and other supporting evidence on record that controverted Respondent's proffered nondiscriminatory reason of "lack of funding," "implementation of reduction-in-force," and "justification for termination"; yet, Petitioner's properly cross-motions were unaddressed; yet, denied.

Respondent filed an insufficient Opposition (Document 61) to Petitioner's cross-motion for summary judgment (Document 58); but, failed to file an Opposition to the motion supplement (Document 64) or Petitioner's subsequent motion for entitlement to summary judgment (Document 74).

Respondent's Opposition (Document 61) failed to controvert factual statements in Petitioner's cross-motion for summary judgment (Document 58).

> *All material facts set forth in the statement of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted. See Gullickson v. Southwest Airlines Pilots' Ass'n,* 87 F.3d 1176, 1183 (10th Cir. 1996).

As alleged in Petitioner's summary judgment motions (Documents 58, 64), Respondent's alleged

"lack of funding," "implementation of a reduction-in-force" and "justification given for Petitioner's termination" were fabrications and Respondent's submissions on file consist of unauthenticated forged documents (Document 58, Facts 9-15; Document 64, pp. 2-5).

Pursuant to Rule 56, Petitioner presented motions for summary judgment (Documents 58, 64, 74) properly supported by a creditable self-affidavit and citations to pleadings, admissions, answers to interrogatories, and affirmative evidence on record. The record shows that Petitioner's motions were uncontroverted by the Respondent (Document 64, p. 5; Document 74). All evidence on record wholly supports Petitioner's Title VII claim of Wrongful Retaliatory Termination.

D. In compliance with Rule 56(c), Petitioner was entitled to summary judgment as a matter of law on her cross-motion(s)

Petitioner's motions for summary judgment (Documents 58, 64, 74), in compliance with Fed.R.Civ.P. 56(c) requirements, were uncontroverted by Respondent and affirmatively supported by evidence on record; although, the District Court failed to address the motions(s), they were inappropriately denied in his Order (App. 4-6). The Court of Appeals failed to address the reaffirmed issues in Petitioner's Informal Appeal Brief (Document 11); yet, affirmed the District Court's Judgment (App. 1-2).

Rule 56(e) in pertinent part provides:

> . . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth factual specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Respondent failed to point to evidence in the record to controvert Petitioner's factual statements and exhibits that support her claim of wrongful retaliatory termination in violation of Title VII. "*Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.*" *Painter v. Peavy,* 192 W. Va. 189, 451 S.E.2d 755 (1994).

Based on Respondent's contrary and self-controverting submissions and Petitioner's uncontroverted factual and affirmative submissions, under Rule 56 of the Federal Rules of Civil Procedure, Petitioner is entitled to judgment as a matter of law on all elements of her Title VII Wrongful Retaliatory Termination Claim.

E. The District Court failed to conduct the required *de novo* review of Petitioner's Objections to the magistrate judge's report and recommendations

A grant of summary judgment is reviewed "*de novo*" *(meaning, without deference to the views of the trial judge)* both as to the determination that there is no remaining genuine issue of material fact and that the prevailing party was entitled to judgment as a matter of law; *See McKeever v. Block,* 932 F.2d 795, 798 (9th Cir. 1991); *Taylor v. Farrier,* 910 F.2d 518, 521 (8th Cir. 1990); *Calderon v. Waco Lighthouse for the Blind*, 630 F.2d 352, 356 (5th Cir. 1980).

Under 28 U.S.C. § 636(b)(1):

> district courts may designate magistrate judges to conduct, *inter alia,* evidentiary hearings on suppression motions and to submit to a district judge proposed findings of fact and recommendations for the disposition of the matter. Section 636(b)(1) also requires that when a party objects to the report and recommendation of a magistrate judge concerning a dispositive matter, "[a] judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *Id.*; *see also* Fed. R. Civ. P. 72(b).

The District Court's review must include *de novo* review of the magistrate's findings of fact, including any credibility determinations; *United States v.*

Lothridge, 324 F.3d 599, 600 (8th Cir. 2003). Petitioner filed specific Objections (Document 91) to the Magistrate Judge's Report (Document 86) and wholly objected to the unfounded Recommendations (Document 91, p. 14). The Report was wholly devoid of finding of facts applicable to Rule 56(c). Although, a mandatory *de novo* was required, the District Court's Order states:

> In conducting this review, the court applies the following standard:
>
> > *The magistrate judge makes only a recommendation to the Court, to which any party may file written objections. . . . The Court is not bound by the recommendation of the magistrate judge but, instead, retains responsibility for the final determination. The Court is required to make a de novo determination of those portions of the report or specified findings or recommendations as to which an objection is made. However, the Court is not required to review, under a de novo or any other standard, the factual or legal conclusions of the magistrate judge as to those portions of the Report and Recommendation to which no objections are addressed. While the level of scrutiny entailed by the Court's review of the Report thus depends on whether or not objections have been filed, in either case, the Court is free, after review, to accept, reject, or modify any of the magistrate judge's findings or recommendations.*

> *Wallace v. Housing Auth. of the City of Columbia,* 791 F. Supp. 137, 138 (D.S.C. 1992) (citations omitted). In light of this standard, the Court has reviewed the Report. After careful review of the Report, the objections thereto, and the memoranda filed in this case, the Court elects to accept the Report (Document 86).

As stated in the Order (App. 5-6), *"the court elects to accept the Report"; however, the Order failed to acknowledge reviewing and accepting the Recommendations.* Although, the *de novo* standard was articulated, the wording of the Order confirms the *de novo* review was not conducted (App. 5). *Failure to engage in the required de novo review is reversible error. See, e.g., Hudson v. Gammon,* 46 F.3d 785, 786 (8th Cir. 1995). *This is so because unless the ultimate decision is made by a district judge, Article III power has effectively been exercised by a magistrate judge, see United States v. Raddatz,* 447 U.S. 667, 677-78, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980). *The exercise of ultimate judicial authority by other than Article III officers affects both individual and structural constitutional protections.*

Additionally, the District Court failed to conduct a *de novo* of grant and denial of summary judgment under rule 56(c) and also failed to apply a summary judgment standard of review (App. 4-6).

II. The Court of Appeals and District Court's grave abuse of discretion

A. Court of Appeals failed to address issues in Petitioner's Appeal Brief and failed to conduct *de novo* review to determine whether District Court erred in Judgment

The Court of Appeals (App. 2) abused its discretion when it failed to conduct a *de novo* review of the District Court's grant and denial of summary judgment (App. 4-6). *B&G Enters., Ltd. v. United States*, 220 F.3d 1318, 1322 (11th Cir. 2000); *Thornton v. E.I. Du Pont de Numours & Co.*, 22 F.3d 284, 288 (11th Cir. 1994). The proper manner of review by this Court depends upon the particular issues presented on appeal. If it is alleged that the agency's decision was based on an error of law then *de novo* review is required. If, however, it is alleged that the agency's decision was not supported by the evidence or that the decision was arbitrary or capricious, then the reviewing court must apply the "whole record" test. *In re Appeal of Ramseur*, 120 N.C. App. 521, 524, 463 S.E.2d 254, 256 (1995) (citations omitted). Petitioner's Appeal Brief and its supporting memorandum (Document 11) which was unaddressed and Petitioner's Petition for Rehearing (Document 16) which was unaddressed and denied (Document 19) specifically cited evidence in the record to affirmatively controvert Respondent's defense.

The Court of Appeals, the District Court and Respondent circumvented the "*wrongful termination*"

element of Petitioner's Title VII Claim and, *although contrary to evidence in the record,* inconclusively asserts there was no *"Retaliation"* (App. 2; App. 25; and Respondent's motion Document 55). However, Petitioner's motions for summary judgment (Documents 58, 64) point to evidence on record which negates Respondent's proffered reason; accordingly, Petitioner's termination was illegal and retaliatory in violation of Title VII.

Because the District Court's Order was devoid of factual findings, application of law, summary judgment standard of review and required *de novo* review (App. 4-6), the Court of Appeals could not determine whether the District Court's Order and Judgment was in error; accordingly, the Court of Appeals' Opinion (App. 1-2) in part merely states:

> *We have reviewed the record and find no reversible error.*

Additionally, the Court of Appeals' denial for rehearing merely states:

> *The Court denies the petition for rehearing.*

The Court of Appeals abused its discretion when it failed to determine whether there were any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *State Farm Fire & Casualty Co. v. Martin,* 872 F.2d 319, 320 (9th Cir. 1989). A grant or denial of summary judgment is a question of law which is reviewed *de novo. Darring v. Kincheloe,* 783 F.2d 874, 876 (9th Cir. 1986).

Petitioner's motion(s) for summary judgment (Documents 58, 64, 74), was uncontroverted by Respondent; accordingly, there were no disputed facts. Respondent's motion for summary judgment was controverted by Petitioner's citation to affirmative evidence in the record and Respondent's bad faith motion, affidavit and contrary submissions. Summary judgment may be affirmed only if "there is no genuine issue as to any material fact" and movant is entitled to "a judgment as a matter of law." Fed.R.Civ.P. 56(c). *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). Supported by evidence in the record and Fed.R.Civ.P. 56(c) stipulations, as the movant Respondent was not entitled to summary judgment "*as a matter of law*"; however, as the movant, evidence on record confirms, Petitioner was entitled to summary judgment "as a matter of law".

The Court of Appeals and District Court employed an abuse of discretion by failing to consider facts, evidence, legal standards, Fed.R.Civ.P. 56(c), constitutional rights, and Title VII provisions (App. 1-7). *A trial court necessarily abuses its discretion "when it commits an error of law," Wyandotte Nation v. Sebelius,* 443 F.3d 1247, 1252 (10th Cir. 2006), *or "fails to consider the applicable legal standard. . . ." Ohlander v. Larson,* 14 F.3d 1531, 1537 (10th Cir. 1997). For instance, in *Thiessen v. General Electric Capital Co.,* 267 F.3d 1095, 1105-08 (10th Cir. 2002).

The Court of Appeals and the District Court employed an abuse of discretion by failing to address

Petitioner's properly supported motion(s) for summary judgment (Documents 58, 64, 74).

The Court of Appeals and the District Court exercised an abuse of discretion by granting Respondent's controverted motion for summary judgment (Document 55) and denying Petitioner's uncontroverted motion(s) for summary judgment (Documents 58, 64, 74) without making Rule 56(c) determinations and without applying the required legal standards of review. *The district court did not identify with any specificity the facts that it assumed in denying and granting summary judgment, see Blossom v. Yarbrough*, 429 F.3d 963, 966 (10th Cir. 2005). The Opinion and Order(s) of the lower courts are devoid of factual determinations, required standards of review, and legal bases (App. 2; App. 4-6). Accordingly, the lower courts failed to consider the required statutory factors in their decision-making process; *Congdon v. Congdon,* 40 Va. App. 255, 262, 578 S.E.2d 833, 836-37 (2003) (citations omitted).

B. Court of Appeals and District Court employed an abuse of discretion by willfully entering Judgments unsupported by evidence on record

Summary Judgment Standard of Review

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a

judgment as a matter of law." Fed.R.Civ.P. 56(c); *see Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). "In essence . . . the inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251-52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). On a motion for summary judgment the court must view all inferences drawn from the underlying facts "in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

Neither the Appeals Court nor the District Court made factual determinations or applied laws; the record as a whole is devoid of facts to support Opinion of the Court of Appeals (App. 2) and Order of the District Court (App. 4-6).

The Court of Appeals and the District Court employed grave abuse of discretion in the obstruction of justice by: (a) willfully suppressing evidence; (b) entering Orders, Opinions, and Judgments unsupported by evidence on record; (c) violating Federal Rules of Civil Procedures Rule 56(c); (d) violating federal statutes; (e) violating Petitioner's seventh and fourteenth amendment rights; (f) and, (g) violating provisions of Title VII and Petitioner's protection under its anti-retaliation provision.

> An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support. *Fields*, 363 S.C. at 26, 609 S.E.2d at 509; *Renney v. Dobbs House, Inc.*, 275 S.C. 562, 274 S.E.2d 290 (1981).

The Court of Appeals and the District Court's unfounded judgments were more than errors of judgment; their judgments were unreasonable, arbitrary, and unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 Ohio B. 481, 450 N.E.2d 1140; *Pons v. Ohio State Med. Bd. (1993),* 66 Ohio St.3d 619, 621, 1993 Ohio 122, 614 N.E.2d 748.

The Court of Appeals and the District Courts willful obstruction of procedural due process and disregard of applicable laws, is a grave abuse of discretion. *See Dusseau v. Metropolitan Dade County Bd. of County Comm'rs,* 794 So.2d 1270, 1273 (Fla. 2001).

III. Deprivation of Rights

The Court of Appeals and the District Court violated Petitioner's seventh and fourteenth amendment rights and Petitioner's protection under Title VII and its anti-retaliation provision.

Under Title 18 U.S.C. § 242 Congress provides that judges are liable for criminal acts committed under "color of law."

18 U.S.C. § 242 in pertinent part states:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . [shall be guilty of an offense against the United States]. *Monroe v. Pape*, 365 U.S. 167, 183-187 (1961) ("under color of state law" includes misuse of power possessed by virtue of state law and made possible because the wrongdoer is clothed with the authority of state law).

Violation of Seventh and Fourteenth Amendment Rights

Petitioner holds that the Report and Recommendations, Orders, Judgments and Opinions entered in this case are wholly unfounded and in violation of her guaranteed Seventh and Fourteenth Amendment Rights, as set forth in the U.S. Constitution.

Seventh Amendment in pertinent part provides:

> *In Suits at common law, where the value in controversy shall exceed twenty dollars, "the right of trial by jury shall be preserved . . . "*

Grant of summary judgment to Respondent, denial of summary judgment on an unaddressed motion, and dismissal of Petitioner's Civil Action unsupported by evidence on record is a deprivation of Petitioner's Seventh Amendment Right. The evidence on record shows Judgment as a matter of law is

appropriate when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Rule 50(a); *see also Lifewise Master Funding v. Telebank*, 374 F.3d 917, 923 (10th Cir. 2004). If this standard is satisfied, then the entry of judgment as a matter of law does not contravene the Seventh Amendment guarantee of trial by jury. *See Weisgram v. Marley Co.*, 528 U.S. 440, 449-50 (2000); *cf. Shannon v. Graves*, 257 F.3d 1164, 1167 (10th Cir. 2001) ("The Seventh Amendment is not violated by proper entry of summary judgment, because such a ruling means that no triable issue exists to be submitted to a jury."). In this case summary judgment was improperly entered.

Fourteenth Amendment, in pertinent part provides:

> . . . , no State shall "make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"; no State shall "deny to any person within its jurisdiction the equal protection of the laws."

The Court of Appeals and the District Court impeded procedural due process and failed to apply applicable law to the facts. *See Dusseau v. Metropolitan Dade County Bd. of County Comm'rs,* 794 So.2d 1270, 1273 (Fla. 2001; *Shelley v. Kraemer,* 334 U.S. 1, 13 (1948); *Burton v. Wilmington Parking Authority,* 365 U.S. 715, 721-722 (1961); *See City of Boerne v. Flores,* 521 U.S. 507, 519 (1997).

Violation of Petitioner's Protection under Title VII

The Court of Appeals and the District Court abused their discretion by failing to enforce Petitioner's protection under Title VII and its anti-retaliation provisions.

Congress enacted Title VII to eradicate discrimination, and included an anti-retaliation provision to secure that objective by preventing employers from interfering with employee efforts to advance the goals of Title VII's anti-discrimination provisions. Yet, the lower courts has undermined Congress's goals pursuant to Title VII and the prohibiting of discrimination.

Title VII forbids an employer from retaliating against an employee who engages in certain protected activities. *See* 42 U.S.C. § 2000e-3(a). *A retaliation claim, like a discrimination claim, may be supported by direct evidence or by a prima facie case under McDonnell Douglas. See Stover v. Martinez,* 382 F.3d 1064, 1070 (10th Cir. 2004).

42 U.S.C. § 2000e, et seq.

> Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, et seq., prohibits discrimination in employment on the basis of race, sex, national origin and religion. It also is unlawful under the Act for an employer to take retaliatory action against any individual for opposing employment practices made unlawful by Title VII or for filing a discrimination charge or for testifying or assisting or

> participating in an investigation, proceeding, or hearing under Title VII.

Petitioner's Claim was supported with direct evidence; yet, the lower courts condoned Respondent's violation of Title VII and employed an abuse of discretion by willfully suppressing Respondent's indiscretion and violating Petitioner's constitutional rights.

Section 704(a) of Title VII of the Civil Rights Act of 1964 prohibits employers from retaliating against individuals who oppose practices that are unlawful under Title VII, and who participate in Title VII proceedings:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Title VII Participation Clause is to protect the employee who utilizes the tools provided by Congress to protect his rights. *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978) ("It is well settled that the participation clause shields an employee from retaliation regardless of the merit of his EEOC charge").

CONCLUSION

The Petition for a Writ of Certiorari should be granted because the Court of Appeals and District Court's decisions unsupported by evidence on record radically departs from well-established Federal Rules of Civil Procedures, particularly those governing summary judgment (Rule 56(c)), and Principles of Law.

Respectfully submitted,

ROSLYN HOLMAN
(*Pro se Petitioner*)
1333 Stillfork Road
Darlington, SC 29532
(843) 393-2036

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-1898

ROSLYN HOLMAN,

Plaintiff-Appellant,

versus

CLEMSON UNIVERSITY,

Defendant-Appellee.

Appeal from the United States District Court for the District of South Carolina, at Florence. Terry L. Wooten, District Judge. (4:05-cv-02727-TLW)

Submitted: January 29, 2008
Decided: February 12, 2008

Before MOTZ, GREGORY, and DUNCAN, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Rosyln Holman, Appellant Pro Se. James William Logan, Jr., LOGAN, JOLLY & SMITH, L.L.P., Anderson, South Carolina, For Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Roslyn Holman appeals the district court's order accepting the recommendation of the magistrate judge and granting Defendant's motion for summary judgment in her employment discrimination action alleging retaliation. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *Holman v. Clemson University*, No. 4:05-cv-02727-TLW (D.S.C. Aug. 23, 2007). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED.

FILED: February 12, 2008

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-1898
(4:05-cv-02727-TLW)

ROSLYN HOLMAN,

Plaintiff-Appellant,

v.

CLEMSON UNIVERSITY,

Defendant-Appellee.

JUDGMENT

In accordance with the decision of this Court, the judgment of the District Court is affirmed.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/s/ Patricia S. Connor, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

Roslyn Holman, Plaintiff, vs. Clemson University, Defendant.	)))))))	Civil Action No. 4:05-2727

ORDER

Plaintiff Roslyn Holman ("Holman") filed the instant *pro se* action on September 20, 2005, against Defendant Clemson University ("Clemson"). (Doc. #1). On November 14, 2006 Clemson filed the pending motion for summary judgment. (Doc. #55). Holman filed a response and cross motion for summary judgment on December 8, 2006. (Doc. #58). Clemson filed a reply to its motion for summary judgment and a separate response to Holman's cross motion for summary judgment on December 18, 2006. (Docs. #59, 61).

This matter now comes before this Court for review of the Report and Recommendation ("the Report") filed on August 1, 2007, by United States Magistrate Judge Thomas E. Rogers, III, to whom this case had previously been assigned. (Doc. #86). In the Report, Magistrate Judge Rogers recommends that Clemson's motion for summary judgment be granted and Holman's motion for summary judgment

be denied. *Id.* Holman filed objections to the Report on August 10, 2007. (Doc. #91).

In conducting this review, the Court applies the following standard:

> The magistrate judge makes only a recommendation to the Court, to which any party may file written objections. . . The Court is not bound by the recommendation of the magistrate judge but, instead, retains responsibility for the final determination. The Court is required to make a *de novo* determination of those portions of the report or specified findings or recommendation as to which an objection is made. However, the Court is not required to review, under a *de novo* or any other standard, the factual or legal conclusions of the magistrate judge as to those portions of the Report and Recommendation to which no objections are addressed. While the level of scrutiny entailed by the Court's review of the Report thus depends on whether or not objections have been filed, in either case, the Court is free, after review, to accept, reject, or modify any of the magistrate judge's findings or recommendations.

Wallace v. Housing Auth. of the City of Columbia, 791 F. Supp. 137, 138 (D.S.C. 1992) (citations omitted). In light of this standard, the Court has reviewed the Report. After careful review of the Report, the objections thereto, and the memoranda filed in this case, the Court elects to accept the Report. (Doc. #86). Therefore, for the reasons articulated by the Magistrate Judge, it

is **ORDERED** that Clemson's motion for summary judgment is **GRANTED** and Holman's motion for summary judgment is **DENIED**. Accordingly, this action is dismissed and all pending motions are hereby rendered moot.

IT IS SO ORDERED.

/S/ Terry L. Wooten
Terry L. Wooten
United States District Judge

August 23, 2007
Florence, South Carolina

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

Roslyn Holman
Plaintiff
vs.
Clemson University
Defendant

JUDGMENT IN A CIVIL CASE

Case Number:
4:05-cv-02727-TLW

[X] Decision on the Record. This action came before the court on the record. The issues have been reviewed and the Court having accepted the Report and Recommendation of the U.S. Magistrate Judge, and having granted the Defendant's motion for summary judgment and denying Plaintiff's motion for summary judgment;

IT IS ORDERED AND ADJUDGED that summary judgment is entered as to the Defendant, Clemson University. This action is dismissed and all pending motions are rendered moot.

LARRY W. PROPES, Clerk

By /s/ Sharon Welch-Meyer
Deputy Clerk

August 23, 2007

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
FflorENCE DIVISION

ROSLYN HOLMAN, Plaintiff, -vs- CLEMSON UNIVERSITY, Defendants.	) Civil Action No.:) 4:05-2727-TLW-TER)) **REPORT AND RECOMMENDATION**)) (Filed Aug. 1, 2007)

I. INTRODUCTION

This is an employment discrimination case. Plaintiff is proceeding pro se. Plaintiff asserts a cause of action for retaliatory discharge in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.[1]

[1] In its Motion for Summary Judgment, Defendant argues for summary judgment as to race discrimination as well, in the event that Plaintiff meant to assert such a cause of action. However, in her response to Defendant's Motion, Plaintiff declines to respond to Defendant's arguments regarding race discrimination and specifically states "Plaintiff's civil action is based on Defendant's premeditated retaliation which resulted in wrongful termination as noted in April 14, 2005 Complaint . . . filed with EEOC." Plaintiff's Response at 11. Thus, it appears that Plaintiff has not alleged a cause of action for race discrimination and the court need not address Defendant's arguments on that issue. Nevertheless, out of an abundance of caution, to the extent Plaintiff does allege a cause of action for race discrimination, she has failed to present sufficient evidence from which a reasonable jury could conclude Defendant intentionally discriminated against her based on her race. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Presently pending before the Court are Defendant's Motion for Summary Judgment (Document # 55), Plaintiff's Cross-Motion for Summary Judgment (Document # 58) and Plaintiff's Motion for Summary Judgment (Document # 74). All pretrial proceedings in this case were referred to the undersigned pursuant to the provisions of 28 U.S.C. § 636(b)(1)(A) and (B) and Local Rule 73.02(B)(2)(g), DSC. Because these are dispositive motions, this report and recommendation is entered for review by the district judge.

II. FACTUAL AND PROCEDURAL HISTORY

Plaintiff began working as a Fiscal Technician I for Clemson University (the University) on December 8, 1998. Hammig Aff. at ¶ 3 (attached as Ex. 1 to Defendant's Motion). Plaintiff became a Fiscal Technician II on July 16, 2001. *Id.*

According to Defendant, Plaintiff's position was in the College of Agriculture, Forestry, and Life Sciences, Department of Agricultural and Applied Economics (which became known as the Department of Applied Economics and Statistics in 2003). *Id.* at ¶ 2, 3. Defendant asserts that Plaintiff worked in the Agribusiness Management Association (ABMA) program, which is funded by federal and state governments as part of the University's agricultural extension service. *Id.* at ¶ 4. Farmers could join the ABMA (Plaintiff refers to this as the "Farm Management Association") for an annual fee. *Id.* In return, the ABMA conducted financial analysis of their

operations and provided technical assistance. *Id.* Plaintiff provided administrative support to the ABMA by taking the farmers' data and putting it into the computer for analysis. *Id.* and Plaintiff's Response at 3.

Plaintiff asserts that her position was not with the College of Agriculture, Forestry and Life Sciences, but with the Clemson Extension Public Service Program-Farm Management Associations. Plaintiff's Response at 8. However, as noted by Plaintiff, the "College of Agriculture, Forestry and Life Sciences has an agreement with the United States Department of Agriculture to organize and maintain at its institution a definite and distinct administrative division for the management and conduction of all Cooperative Extension work in agriculture and economics." *Id.* at 4. In addition, one of the exhibits cited by Plaintiff to support her contention that she did not work for the College of Agriculture, Forestry and Life Sciences actually states that the Department of Applied Economics and Statistics, part of the College of Agriculture, Forestry and Life Sciences, performs outreach activities by providing "economic information to citizens, agricultural producers and agribusiness in South Carolina through the Clemson Cooperative Extension Service." Ex. K2 to Plaintiff's Response. Thus, it appears by Plaintiff's own evidence that her position fell under the College of Agriculture, Forestry and Life Sciences.

Plaintiff worked at Clemson's Pee Dee Research and Education Center (Pee Dee REC) in Florence,

South Carolina. Hammig Aff. at ¶ 5. Through October of 2003, her supervisor was Chris Robinson, a Clemson University Extension Associate and ABMA Consultant. *Id.* In 2003, Chris Robinson resigned and his position was not replaced. *Id.* at ¶ 6. The Florence area ABMA members transferred their memberships to the Sumter office where Scott Mickey became their consultant. *Id.* According to Defendant, another fiscal technician already employed in Sumter was able to handle the tasks associated with the memberships that were transferred from Florence and Plaintiff was the only employee associated with the Department of Applied Economics and Statistics that was still located at the Pee Dee REC. *Id.*

Plaintiff asserts that Suzanne Coker also worked as a fiscal technician at the Pee Dee REC and still maintained an office there at the time of Plaintiff's termination. Plaintiff's Response at 4. The only evidence submitted by Plaintiff as support for this factual allegation is an email from an individual named Greg Clemson in which he asks Plaintiff to tell Coker to return her two keys and gate card, presumably for the Florence office. Ex. Q to Plaintiff's Motion. Plaintiff later asserts that Coker was supervised by Scott Mickey, who is in the Sumter office, as opposed to Chris Robinson, who was in the Florence office. Plaintiff's Response at 10. Plaintiff then asserts that "the other Fiscal Technician II" was transferred following their supervisor's resignation. Plaintiff's Response at 12. It is not clear whether Plaintiff is referring to Suzanne Coker.

Due to budgetary constraints and Chris Robinson's resignation, Michael D. Hammig, Department Chair for the Department of Applied Economics and Statistics, recommended a reduction in force and elimination of Plaintiff's position on November 10, 2004. Hammig Aff. at ¶ 7. As a state supported institution of higher learning, the University was required to develop a Reduction-in-Force Policy (RIF Policy) to be followed for layoffs caused by reorganization, work shortage, or loss of funding. Marcus Aff. at ¶ 3 (attached as Ex. 2 to Defendant's Motion). The RIF Policy provides that the order of the reduction of force of covered employees shall be determined by the total number of retention points for each employee in a competitive class. *Id.* at ¶ 4. The employee in the competitive class with the fewest retention points is laid off first. *Id.* Under the RIF Policy, retention points are calculated based on the total scores of annual performance appraisals for the past two years and the length of continuous state service. *Id.* at ¶ 5.

As required by the RIF Policy and the State Budget and Control Board's Office of Human Resources (OHR) Regulation 19-719.04, a proposed Reduction in Force Plan (RIF Plan) was submitted to the Budget and Control Board's Office of Human Resources for review and approval on January 26, 2005. *Id.* at 7 and Ex. 2B to Defendant's Response. The RIF Plan provides, "as a result of loss of funding and the redirection of resources this reduction in force is necessary as a result of budgetary reductions combined with the closing of an office. This process

will result in the elimination of the Fiscal Technician II for the Department of Applied Economics and Statistics located at the Pee Dee Rec office, Florence, South Carolina." Ex. 2B to Defendant's Response. The RIF Plan identifies the competitive area as the College of Agriculture, Forestry and Life Science and identifies the competitive class as Fiscal Technician Series. *Id.* The RIF Plan also lists the four employees in the class of Fiscal Technician series and the retention credits for each employee. *Id.* Teri Elliott had 21 retention credits, Michael Stephens had 20 retention credits, Suzanne Coker had 13 retention credits and Plaintiff had 10 retention credits. *Id.* The RIF Plan also indicates that there were two positions that Plaintiff would have an opportunity to "bump" into. *Id.* These were related positions in other areas of the University that were held by either a probationary or a temporary employee. *Id.* and Marcus Aff. at ¶ 8.

By letter dated January 31, 2005, the Budget and Control's Office of Human Resources advised that the proposed RIF Plan was approved as procedurally correct. Ex. 2C to Defendant's Motion. Because Plaintiff had the lowest number of retention points in her competitive class, she was advised by letter dated March 2, 2005, that her position would be eliminated effective April 8, 2005. Ex. 2D to Defendant's Motion. The letter stated, "[d]ue to lack of funding, Public Services Activities has determined that the area can no longer support positions associated Applied Economics and Statistics at the Pee Dee Rec location." *Id.* The letter also offered Plaintiff the opportunity to

"bump" into one of two Fiscal Technician II positions available in Clemson, South Carolina. *Id.* The letter informed Plaintiff that she must inform the Human Resources Office, in writing by March 12th, of her desire to accept either of the available positions. *Id.* It stated, "[f]ailure to notify our office of your decision regarding either of these positions will result in a denial to accept the position by default." *Id.* According to Plaintiff, the letter was hand-delivered by Michael Hammig on March 9, 2005. Plaintiff's Response at 4. Plaintiff asserts that the March 12th deadline to respond regarding her "bumping" rights provided insufficient time for Plaintiff to consider relocating for a position that was approximately 210 miles from her home. *Id.* at 7.

Following her receipt of the termination letter, Plaintiff sent two memos and an email to Jerry Knighton in the Office of Access and Equity, alleging that her termination was in retaliation for a Discrimination Charge she filed with the EEOC in 2001, and asking that her termination be investigated. Ex. E1 to Plaintiff's Response. She also sent an email requesting pertinent information relative to her termination. *Id.* Plaintiff had not received any responses to her correspondence as of the date of her termination.

On April 14, 2005, Plaintiff filed a Charge of Discrimination with the EEOC, alleging that the termination of her position was in retaliation for a

previous EEOC charge she filed in May 2001.[2] On July 14, 2005, the EEOC dismissed Plaintiff's charge and issued a Notice of Right to Sue. Ex. 2G to Defendant's Response. This action followed on September 20, 2005.

III. STANDARD OF REVIEW

The moving party bears the burden of showing that summary judgment is proper. Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), FRCP; *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). Summary judgment is proper if the non-moving party fails to establish an essential element of any cause of action upon which the non-moving party has the burden of proof. *Celotex,* 477 U.S. 317. Once the moving party has brought into question whether there is a genuine issue for trial on a material element of the non-moving party's claims, the non-moving party bears

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[2] In the May 2001, Charge of Discrimination, Plaintiff, who is black, alleged that a white co-worker, serving the same job duties as Plaintiff, was hired in at a higher salary than Plaintiff. Ex. A3 to Plaintiff's Response. In July of 2001, the parties reached a settlement agreement in connection with the EEOC charge wherein Clemson agreed (1) to pay Plaintiff a certain amount as a correction in salary for the one year period prior to July 20, 2001; (2) to upgrade Plaintiff's Fiscal Technician I position to Fiscal Technician II and increase her salary accordingly; and (3) not to retaliate against Plaintiff for filing the EEOC complaint. Marcus Aff. at ¶ 14.

the burden of coming forward with specific facts which show a genuine issue for trial. Fed.R.Civ.P. 56(e); *Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574 (1986). The non-moving party must come forward with enough evidence, beyond a mere scintilla, upon which the fact finder could reasonably find for it. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-48 (1986). The facts and inferences to be drawn therefrom must be viewed in the light most favorable to the non-moving party. *Shealy v. Winston,* 929 F.2d 1009, 1011 (4th Cir. 1991). However, the non-moving party may not rely on beliefs, conjecture, speculation, or conclusory allegations to defeat a motion for summary judgment. *Barber v. Hosp. Corp. of Am.,* 977 F.2d 874-75 (4th Cir. 1992). The evidence relied on must meet "the substantive evidentiary standard of proof that would apply at a trial on the merits." *Mitchell v. Data General Corp.,* 12 F.3d 1310, 1316 (4th Cir. 1993).

Rule 56(e) provides, "when a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." *See also Celetex Corp. v. Catrett,* 477 U.S. 317, 324 (1986) (Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves"). To raise a genuine issue

of material fact, a party may not rest upon the mere allegations or denials of his pleadings. Rather, the party must present evidence supporting his or her position through "depositions, answers to interrogatories, and admissions on file, together with . . . affidavits, if any." *Celetex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). *See also Cray Communications, Inc. v. Novatel Computer Systems, Inc.,* 33 F.3d 390 (4th Cir. 1994); *Orsi v. Kickwood,* 999 F.2d 86 (4th Cir. 1993); Local Rules 7.04, 7.05, D.S.C.

IV. DISCUSSION

Plaintiff alleges that her termination in April of 2005 was in retaliation for a Charge of Discrimination she filed with the EEOC in May of 2001. Title 42, Section 2000e-3(a) of the United States Code provides, in relevant part, as follows:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

To establish a *prima facie* case of retaliation under Title VII, a plaintiff must show (1) she engaged in protected activity, (2) the employer took adverse employment action against her, and (3) a causal connection existed between the protected activity and

the adverse action. *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 365 (4th Cir. 1985). In order to establish the requisite causal connection, plaintiff must proffer evidence which establishes that she would not have been terminated but for her protected activity. *Hopkins v. Baltimore Gas & Electric Co.*, 77 F.3d 745, 755 (4th Cir. 1996).

Plaintiff meets the first two elements of a *prima facie* case of retaliation: she engaged in protected activity when she filed the Charge of Discrimination in May of 2001, alleging race discrimination, and she suffered an adverse employment action when her position was eliminated and she was terminated from employment. However, Plaintiff fails to establish that a causal connection existed between her filing of the EEOC Charge in 2001 and her termination in 2005. In her Response, Plaintiff lists the following exhibits as establishing there was a casual link between the protected activity and the adverse employment action (*see* Plaintiff's Response at 13):

(1) **Exhibit P, Page 2:** Page two of Exhibit P is the second page of an exchange of emails, dated June 12 and 13, 2003, among Plaintiff, Chris Robinson, and Corey Risch. The exchange of emails reveals that both Robinson and Plaintiff asked Risch when he was planning to send work to Plaintiff and Risch responded that the work was forthcoming, but it was taking him a while to get it ready. Plaintiff asserts that this exhibit shows that Risch stopped sending Plaintiff work and stopped responding to her requests for work.

(2) **Exhibit S:** Exhibit S is an exchange of emails, dated March 15, 2005, through April 12, 2005, between Plaintiff and Chris Robinson. Plaintiff informed Robinson that her position had been eliminated and that she had not been given any work since he left. She also informed him that "S. Coker" had not worked from the Florence office since he left although she still had some personal belongings there. Robinson apologized that he could not help her but advised that he was unaware of anything that went on after he resigned.

(3) **Exhibit N2:** This exhibit is Defendant's Answers to Plaintiff's Interrogatories. According to Plaintiff, this exhibit indicates that consultants sent their work directly to the other Fiscal Technician although it was supposed to be sent to the Data Processing Center and processed randomly.

(4) **Exhibits D1 and D2:** Exhibit D1 is Plaintiff's termination letter. Exhibit D2 is a Budget Update dated February 25, 2005, from John Kelly, Vice President for Public Service and Agriculture, indicating that the South Carolina House Ways and Means Committee adopted a recommendation for $2,753,047 in additional base funding for PSA. Plaintiff asserts that these exhibits show that there was not a lack of funding for Plaintiff's position as alleged in the termination notice.

(5) **Exhibit J1:** This is a copy of the letter submitting the RIF Plan. Plaintiff argues that the RIF Plan was unauthorized because the letter was not signed and, thus, the elimination of her position was unauthorized.

(6) **Exhibits J2, A1, C, D1:** Exhibit J2 is the RIF Plan and the letter approving the RIF Plan as procedurally correct. Exhibit A1 is an internet print out about Clemson Extension and South Carolina Farm Management Associations and an email announcing that Toby Boring is moving his office to the Greenwood County Extension Office. Exhibit C is an internet print out about Clemson's Public Service and Agriculture Administration. Exhibit D1 is Plaintiff's termination letter. According to Plaintiff, these exhibits show that the allegedly approved Reduction in Force was not applicable to Plaintiff's position as Plaintiff's position was with Public Services.

(7) **Exhibit D1:** This is Plaintiff's termination letter. Plaintiff claims that it shows Defendant's non-response to her correspondence concerning her termination.

(8) **Exhibit I1:** This exhibit is a letter, dated May 11, 2005, to the EEOC from Lawrence Nichols, II, Chief Human Resources Office, regarding Plaintiff's April 2005 Charge of Discrimination. In the letter, Nichols asserts, among other things, that contrary to Plaintiff's allegation, someone did respond to Plaintiff's email regarding her termination

and a copy of the email is attached to the letter. Plaintiff argues that the attached email was fabricated because the date was cut off and it was actually sent after Plaintiff's last day of employment. Plaintiff also asserts that Defendant contradicts itself numerous times in the letter.

(9) **Exhibits N1 and N2:** Exhibit N1 is Defendant's Answer. Exhibit N2 is Defendant's Answers to Plaintiff's Interrogatories. Plaintiff claims there are inconsistencies between the two documents.

A review of these exhibits, in the light most favorable to Plaintiff and in conjunction with the other exhibits and Plaintiff's Response, fails to reveal a causal connection between her termination and her May 2001 Charge of Discrimination. To establish the requisite causal connection, Plaintiff must proffer evidence that establishes that she would not have been terminated but for her protected activity. *Hopkins,* 77 F.3d at 755. At most, Plaintiff's evidence reveals that Defendant's reasons for eliminating her position were inconsistent with her understanding of which Department her position fell under and her understanding of the budget at the time of her termination. Such a showing is insufficient to establish that she would not have been terminated *but for* her Charge of Discrimination in 2001.

Furthermore, although "temporal proximity" can provide proof of causation when the adverse employment action occurs in "very close" proximity to the

protected activity, *see Clark County Sch. Dist. v. Breeden,* 532 U.S. 268, 273-74 (2001), such proximity is not present in this case. Although *Clark* does not establish the outer boundaries for when temporal proximity should be considered "very close," it does cite examples of cases where three and four months between the protected activity and the adverse employment action were insufficient to alone establish causation as a result of temporal proximity. *Id.* Plaintiff's termination occurred nearly four years after her protected activity. Therefore, she must establish something more than just the fact that the termination occurred after the protected activity. Because Plaintiff has failed to do so, she has failed to establish a *prima facie* case of discrimination.

However, even if Plaintiff could establish a causal connection between her Charge of Discrimination in 2001 and her termination in 2005, Defendant has proffered a legitimate non-retaliatory reason for her termination.

Once Plaintiff establishes a *prima facie* case of retaliation, the burden shifts to Defendants to produce a legitimate, non-retaliatory reason for the adverse employment action suffered by Plaintiff. *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 254 (1981). This is merely a burden of production, not of persuasion. *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 506 (1993).

Defendant asserts that Plaintiff's position was terminated due to budgetary constraints, Chris

Robinson's resignation, and the closing of the office in Florence. Furthermore, the proper procedures were followed by Defendant in terminating Plaintiff's position. In November of 2004, Hammig recommended a Reduction in Force due to the above cited reasons. Plaintiff's position was recommended for termination because she had the lowest number of retention credits of the four employees in her competitive class. A proposed RIF Plan was submitted to the Budget and Control Board's Office of Human Resources for review and approval on January 26, 2005. The Budget and Control's Office of Human Resources advised that the proposed RIF Plan was approved as procedurally correct, and Plaintiff was advised by letter dated March 2, 2005, that her position would be eliminated effective April 8, 2005. Plaintiff was also offered the opportunity to "bump" into one of two Fiscal Technician II positions available in Clemson, South Carolina.

Because Defendant has met its burden of producing a legitimate non-retaliatory reason for Plaintiff's termination, the burden shifts back to Plaintiff to demonstrate by a preponderance of the evidence that the legitimate reason produced by Defendant is not its true reason, but pretext for retaliation. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143 (2000). Throughout the burden shifting scheme set forth in *McDonnell Douglas Corp. v. Green,* 411

U.S. 792 (1973)[3], the ultimate burden of proving that Defendants intentionally retaliated against Plaintiff remains at all times with Plaintiff.

Plaintiff has failed to submit any evidence establish that Defendant's legitimate, non-retaliatory reason for her termination is merely pretext for a retaliatory reason. As stated above, at most, Plaintiff's evidence reveals that Defendant's reasons for eliminating her position were inconsistent with her understanding of which Department her position fell under and her understanding of the budget at the time of her termination. It is outside the province of this Court to determine whether Plaintiff's termination was wise, fair, or just. *See DeJarnette v. Corning, Inc.*, 133 F.3d 293, 299 (4th Cir. 1998) ("[T]his Court does not sit as a kind of super-personnel department weighing the prudence of employment decisions made by firms charged with employment discrimination. . . ." (internal quotation marks omitted)); *Henson v. Liggett Group, Inc.*, 61 F.3d 270, 277 (4th Cir.1995) ("We have recognized the importance of giving an employer the latitude and autonomy to make business decisions, including workplace reorganization, as long as the employer does not violate the ADEA."); *Jiminez v. Mary Washington College*, 57 F.3d 369, 377 (4th Cir.1995) ("Title VII is not a vehicle for substituting the judgment of a court for that of the employer").

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[3] The *McDonnell Douglas* burden shifting scheme applies in analyzing retaliation claims under Title VII. *Smith v. First Union Nat'l Bank*, 202 F.3d 234 (4th Cir.2000).

"Proof that the employer's proffered reasons are unpersuasive, or even obviously contrived, . . . does not necessarily establish that [plaintiff's] proffered reason . . . is correct." *Reeves,* 530 U.S. at 146-47. "It is not enough to disbelieve the [employer]." *Love-Lane v. Martin,* 355 F.3d 766, 788 (4th Cir. 2004). Plaintiff must show a reasonable jury could "believe [her] explanation" of why she was terminated. *Id.* Plaintiff's explanation of why she was terminated is that Defendant retaliated against her for filing an earlier Charge of Discrimination. However, Plaintiff's evidence is insufficient to establish that she would not have been fired *but for* her Charge of Discrimination in 2001, and no reasonable jury could conclude as much. Again, it is not for this Court to decide whether Plaintiff's termination was fair, but only whether Defendant retaliated against Plaintiff as a result of her actions in 2001. The undersigned concludes that Plaintiff's termination was not in retaliation for her Charge of Discrimination and that, as such. Plaintiff's claim should be dismissed.

V. CONCLUSION

For the reasons set forth above, it is recommended that Defendant's Motion for Summary Judgment (Document # 55) be granted, Plaintiff's Cross-Motion for Summary Judgment (Document # 58) be denied and Plaintiff's Motion for Summary Judgment (Document # 74) be denied.

In addition, Plaintiff also has pending a Motion for Correct Transcript or Refund (Document # 49) and a Motion for Refund (Document # 52). Although these are not dispositive motions, because they involve allegations against the undersigned, a recommendation is being entered on these motions rather than a ruling. Although Plaintiff's first motion is entitled Motion for Correct Transcript or Refund, she actually seeks a copy of the official electronic sound recording from the October 2, 2006, hearing with the undersigned or a refund of the $66.00 she paid for the transcript of the hearing. In her subsequent motion, Plaintiff indicates that she received a copy of the official electronic sound recording. Thus, it is recommended that Plaintiff's Motion for Correct Transcript or Refund (Document # 49) be deemed moot. In Plaintiff's second motion, she claims that the sound recording she received is fictitious and requests a refund of the $26.00 she paid for the audio CD. The undersigned has reviewed Plaintiff's motion and finds it to be without merit. As such, it is recommended that Plaintiff's Motion for Refund (Document # 52) be denied.

If the district judge accepts the recommendation as to Defendant's Motion for Summary Judgment, all other pending motions will be moot.

s/ Thomas E. Rogers, III
Thomas E. Rogers, III
United States Magistrate Judge

August 1, 2007
Florence, South Carolina

The parties' attention is directed to the important notice contained of the following page.

FILED: April 18, 2008

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-1898
(4:05-cv-02727-TLW)

ROSLYN HOLMAN,

Plaintiff-Appellant

v.

CLEMSON UNIVERSITY,

Defendant-Appellee

ORDER

The Court denies the petition for rehearing.

Entered at the direction of the panel: Judge Motz, Judge Gregory, and Judge Duncan.

For the Court

/s/ Patricia S. Connor, Clerk